

SHELLEY COX,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

)
) No. CV-09-3046-CI
)
) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND REMANDING TO THE
) COMMISSIONER FOR ADDITIONAL
) PROCEEDINGS PURSUANT TO 42
) U.S.C. § 405(g)
)
)

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 14, 21.) Attorney D. James Tree represents Shelley Cox (Plaintiff); Special Assistant United States Attorney Nancy Mishalanie represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court the court **GRANTS** Plaintiff's Motion for Summary Judgment, and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. § 405(g).

Plaintiff protectively filed for disability insurance benefits

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
REMANDING TO THE COMMISSIONER FOR ADDITIONAL PROCEEDINGS
PURSUANT TO 42 U.S.C. § 405(q) - 1

1 (DIB)on January 6, 2006. (Tr. 94.) She alleged disability due to
2 foot, back, and hip problems; obsessive-compulsive disorder (OCD);
3 depression; and attention-deficit hyperactivity disorder (ADHD) with
4 an onset date of January 1, 1999. (Tr. 114.) Her claim was denied
5 initially and on reconsideration. Plaintiff requested a hearing
6 before an administrative law judge (ALJ), which was held on June 14,
7 2007, before ALJ Linda Haack. (Tr. 268-73.) Plaintiff appeared
8 without an attorney representative, and the hearing was continued to
9 give her time to retain counsel.¹ (Tr. 272.) Mr. Tree, who was
10 appointed representative on April 2, 2008, (Tr. 40) appeared with
11 Plaintiff at the continued hearing on May 8, 2008, before ALJ
12 Catherine R. Lazuran. (Tr. 274-325.) Plaintiff, her mother Ellen
13 Louise Anthony, and vocational expert Nancy Bloom (VE) testified.
14 (*Id.*) The ALJ denied benefits on November 26, 2008, and the Appeals
15 Council denied review. (Tr. 5-7, 15-27.) The instant matter is
16 before this court pursuant to 42 U.S.C. § 405(g).

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¹ Prior to the June 2007 administrative hearing, Plaintiff's
20 personal representative was her mother, Ellen Louise Anthony. (Tr.
21 165.) After the June 2007 hearing, Plaintiff attempted to retain
22 counsel. It appears the first attorney retained withdrew on
23 February 2, 2008 (Tr. 42); Mr. Tree was appointed attorney
24 representative on April 2, 2008, (Tr. 40) and appeared at the May 8,
25 2008, hearing with Plaintiff. ALJ Lazuran acknowledged that Mr.
26 Tree had taken the case "at the last minute," and it was "an unusual
27 situation." (Tr. 277.)
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STATEMENT OF THE CASE

The facts of the case are set forth in detail in the transcript of proceedings, and are briefly summarized here. At the time of the hearing, Plaintiff was 39 years old, married and living with her spouse. (Tr. 278-79.) She testified she has a 19-year-old daughter who had lived with and been cared for by Plaintiff's mother between first grade and ninth grade. (Tr. 302-03, 315.) Plaintiff completed high school with no special education classes reported. (Tr. 121.) Plaintiff testified she attended culinary school for a couple of months. (Tr. 279.) At the time of the hearing, she was working delivering boxes for two companies. (Tr. 280.) She reported she earned about \$660 a month working a few hours a week, and had been doing this since 2006. (Id.) Plaintiff reported past work experience as a house keeper, dishwasher, grocery bagger, prep cook, bakery worker, cashier, fruit sorter, and food service worker. (Tr. 123, 281-93, 320.)

Plaintiff reported she was independent in her activities of daily living and personal care: she was able to clean, vacuum, dust, do laundry, wash dishes, and pay bills. (Tr. 300, 306.) She testified she cooked two or three times a week, but it took longer because of her perfectionism. (Tr. 300.) She also stated since January 1999, she had traveled with friends and/or family to Hawaii, Jamaica, Chicago, and Disneyland. She also reported she and her husband vacation two times a year. (Tr. 303.) Plaintiff testified she could still work in home services, fast foods, and as a bagger; she could walk 30 minutes before experiencing pain, but she could not keep a job because of her OCD, ADHD and recently diagnosed

1 Asperger's disorder. (Tr. 294.)

2 **ADMINISTRATIVE DECISION**

3 ALJ Lazuran found Plaintiff's date of last insured for DIB
4 purposes was December 31, 2002. (Tr. 17.) At step one, the ALJ
5 found Plaintiff had not engaged in substantial gainful activity
6 since the alleged onset date through her date of last insured. (*Id.*)

7 At step two, she found Plaintiff had severe impairments of obesity
8 and "a poorly defined developmental disorder." (*Id.*) She concluded
9 other impairments noted in the record were not severe. (Tr. 18.)

10 Non-severe impairments that existed prior to Plaintiff's date of
11 last insured were identified as lumbar pain, left hip pain,
12 vertebrogenic deficits or degenerative disc disease, and foot
13 problems. (Tr. 17-18.) The ALJ also noted other medically

14 determinable non-severe impairments that arose after Plaintiff's
15 date of last insured, *i.e.*, left heel bone spur; foot surgery and
16 pain; back pain; and mental disorders diagnosed in 2008. (Tr. 18-

17 19.) The ALJ determined at step three that the impairments, alone
18 and in combination, did not meet or medically equal one of the
19 listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations

20 No. 4 (Listings). (Tr. 20-21.) The ALJ found Plaintiff's
21 statements regarding her symptoms and limitations were "not credible
22 to the extent they are inconsistent with the residual functional
23 capacity assessment . . . and because the statements do not describe

24 factors existing as of the date last insured." (Tr. 23.) At step
25 four, she determined Plaintiff could perform work at all exertional
26 ranges with the following limitations: she could stand or walk 6 of
27 8 hours; sit 6 of 8 hours; occasionally stoop, kneel, crouch, and

1 crawl; and do simple work tasks "involving occasional social
2 interaction." (Tr. 21.) Considering VE testimony at step four,
3 the ALJ found Plaintiff could perform several of her past relevant
4 jobs: dishwasher, prep cook, pastry helper, fruit sorter, counter
5 attendant, delivery driver, bagger, and housekeeper. (Tr. 25.)

6 Recognizing that some of Plaintiff's former employment was of
7 short duration and may not meet the definition of past relevant
8 work,² the ALJ proceeded to step five. (Tr. 26.) Considering
9 Plaintiff's RFC and VE testimony, the ALJ determined there was a
10 significant number of jobs Plaintiff could perform, including
11 dishwasher, housekeeper, delivery driver and fruit sorter.
12 Therefore, she was not under a "disability" as defined by the Social
13 Security Act from her alleged onset date through her date of last
14 insured. (*Id.*)

15 STANDARD OF REVIEW

16 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
17 court set out the standard of review:

18 A district court's order upholding the Commissioner's
19 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
20 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
21 Commissioner may be reversed only if it is not supported
22 by substantial evidence or if it is based on legal error.
23 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
Substantial evidence is defined as being more than a mere
scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to

24 ² Under the Regulations, to be considered "past relevant work"
25 a job must have been performed within the last 15 years, lasted long
26 enough for the claimant to have learned to do it, and been
27 substantial gainful activity. 20 C.F.R. § 404.1565(a).
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support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from

1 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
2 404.1512(a)-(b), 404.1513(d)).

3 It is the role of the trier of fact, not this court, to resolve
4 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
5 supports more than one rational interpretation, the court may not
6 substitute its judgment for that of the Commissioner. *Tackett*, 180
7 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
8 Nevertheless, a decision supported by substantial evidence will
9 still be set aside if the proper legal standards were not applied in
10 weighing the evidence and making the decision. *Browner v. Secretary*
11 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
12 there is substantial evidence to support the administrative
13 findings, or if there is conflicting evidence that will support a
14 finding of either disability or non-disability, the finding of the
15 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
1230 (9th Cir. 1987).

16 ISSUES

17 The question is whether the ALJ's decision is supported by
18 substantial evidence and free of legal error. Plaintiff argues the
19 ALJ erred when she: (1) improperly rejected Plaintiff's testimony;
20 (2) improperly rejected Plaintiff's claim of severe OCD at step two;
21 (3) rejected the opinions of examining and treating mental health
22 professionals; (4) failed to call a medical expert to establish the
23 onset date of her mental impairments; (5) failed to supplement the
24 record; (6) failed to give proper weight to her mother's testimony;
25 and (7) failed to include all her limitations in hypothetical
26 questions posed to the VE. (Ct. Rec. 15 at 13-29.)

1 DISCUSSION

2 A. Step Two - Mental Impairments

3 At step two of the sequential evaluation, the ALJ determines
4 whether Plaintiff suffers from a "severe" impairment, *i.e.*, one
5 which has more than a slight effect on the claimant's ability to
6 work. To satisfy step two's requirement of a severe impairment, the
7 claimant must prove the existence of a physical or mental impairment
8 by providing medical evidence consisting of signs, symptoms, and
9 laboratory findings; the claimant's own statement of symptoms alone
10 will not suffice. 20 C.F.R. §§ 404.1508. The effects of all
11 symptoms must be evaluated on the basis of a medically determinable
12 impairment which can be shown to be the cause of the symptoms. 20
13 C.F.R. §§ 404.1529, 416.929. Once medical evidence of an underlying
14 impairment has been shown, medical findings are not required to
15 support the alleged severity of symptoms. *See Bunnell v. Sullivan*,
16 947 F.2d 341, 345 (9th Cir. 1991).

17 The Commissioner has passed regulations which guide dismissal
18 of claims at step two. Those regulations state an impairment may be
19 found to be not severe *only* when evidence establishes a "slight
20 abnormality" on an individual's ability to work. *Yuckert v. Bowen*,
21 841 F.2d 303, 306 (9th Cir. 1988) (*citing Social Security Ruling*
22 (*SSR*) 85-28). The step two inquiry is a "*de minimis*" screening
23 device to dispose of groundless or frivolous claims. *Bowen v.*
24 *Yuckert*, 482 U.S. 137, 153-154 (1987). A mental impairment
25 generally is considered non-severe for purposes of step two if the
26 degree of limitation in the three functional areas of activities of
27 daily living, social functioning, and concentration, persistence or
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1 pace is rated as "none" or "mild" and there have been no episodes of
2 decompensation. 20 C.F.R. §§ 404.1520a(d)(1).

3 In determining whether a claimant has a severe impairment, the
4 ALJ evaluates the medical evidence submitted and must explain the
5 weight given to the opinions of accepted medical sources in the
6 record. A treating physician's opinion carries more weight than an
7 examining physician's, and an examining physician's opinion carries
8 more weight than a non-examining reviewing or consulting physician's
9 opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004);
10 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ must
11 provide "clear and convincing" reasons for rejecting the
12 uncontradicted opinion of an examining medical source. *Lester*, 81
13 F.3d at 830. If the opinion is contradicted, it can only be
14 rejected for "specific" and "legitimate" reasons that are supported
15 by substantial evidence in the record. *Andrews*, 53 F.3d at 1043.

16 Mental health therapists acting independently generally are not
17 "acceptable medical sources" under the Regulations who can establish
18 a medically determinable impairment; however, as "other sources,"
19 their opinions as to the effects of impairments on a claimant's
20 ability to work must be considered and the weight given explained.
21 20 C.F.R. § 404.1513(d). Although a mental health therapist cannot
22 establish a medically determinable impairment, the weight given to
23 his opinions must be evaluated on the basis of the therapist's
24 qualifications, how consistent his opinions are with the other
25 evidence, the amount of evidence provided in support of his
26 opinions, and whether he "has a specialty or area of expertise
27 related to the individual's impairment." SSR 06-03p.

1 **B. Evaluation of Evidence Presented**

2 In her DIB application, Plaintiff claimed disability due to
3 three mental impairments: OCD, ADHD and depression. (Tr. 114.) In
4 support of her claim, she submitted two letters from her mother,
5 Ellen Louise Anthony, dated November 27, 1996, and January 4, 2006.
6 (Tr. 99-100, 103-04.) The letters described Plaintiff's premature
7 birth, her ADHD and OCD symptoms, and behavioral and learning
8 problems since childhood, as well as her problems sustaining
9 employment as an adult. (*Id.*) In addition to letters in the
10 record, Ms. Anthony testified at the hearing and described Plaintiff
11 as having had mental problems from childhood, which Ms. Anthony
12 attributed in part to a premature birth. She also described
13 unsuccessful attempts by doctors to diagnose and treat Plaintiff's
14 condition with medication; behavior and academic problems at school;
15 difficulties holding a job due to compulsive behavior and problems
16 getting along with people; and Plaintiff's difficulties raising her
17 daughter. (Tr. 314-18.) Ms. Anthony's testimony is consistent with
18 the letters submitted as evidence.

19 In April 2008, Plaintiff's newly retained counsel referred
20 Plaintiff to Central Washington Comprehensive Mental Health (CWCMH)
21 for a psychiatric evaluation and mental health treatment. (Tr. 259-
22 65.) Kimberly Humann, M.D., evaluated Plaintiff based on a personal
23 interview and mental status examination. (Tr. 261-64.) As noted by
24 Dr. Humann, no diagnostic tests were ordered or received for review.
25 (Tr. 263.) Dr. Humann summarized Plaintiff's history and
26 unsuccessful treatment of ADHD as a child, sporadic work history,
27 problems with interpersonal relationships, problems caused by her

1 perfectionism. (Tr. 262.) Based on her own observations, Dr.
2 Humann noted Plaintiff's limited insight on how she presents as
3 angry and irritable. (Tr. 263.)

4 Dr. Humann assessed Plaintiff as meeting the criteria for OCD
5 in a severe form with depressive symptoms secondary to the OCD. She
6 also assessed a long history of difficulty with interpersonal
7 relationships; problems modifying her facial expressions and reading
8 those of others; and difficulty "navigating social settings which
9 appears to be within the spectrum of a pervasive developmental
10 disorder." (Tr. 263.) Dr. Humann indicated the specific type of
11 pervasive developmental disorder would be investigated in later
12 therapy sessions. (*Id.*) Based on her examination, diagnoses, and
13 a prior CWCMMH assessment,³ Dr. Humann opined Plaintiff would be
14 unemployable without a supported work environment because of
15 interpersonal difficulties and poor productivity. (*Id.*) Medication
16 was prescribed for Plaintiff's OCD. (Tr. 264.)

17 Clinic notes and a letter from mental health therapist C.J.
18 Burns at CWCMMH note Plaintiff's difficulties with interpersonal
19 relationships since childhood and unsuccessful treatment for ADHD as
20 reported by Plaintiff and her mother. (Tr. 259-60, 265.) Mr. Burns
21 observed Plaintiff had "marked impairments in [her] ability to
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23 ³ Dr. Humann referred the reader to a detailed assessment and
24 description of Plaintiff's disorder by therapist C.J. Burns dated
25 March 28, 2008. (Tr. 262.) However, it does not appear this
26 assessment was made part of the record. On remand, Plaintiff may
27 submit this assessment for consideration.
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1 communicate." (Tr. 260.) The CWCMH records were submitted after the
2 May 2008 hearing and considered by the ALJ in her decision. (Tr.
3 19-20.)

4 At step two, the ALJ found,

5 Letters written by Ellen Louise Anthony, the claimant's
6 mother, describe difficulties in function which have
7 eluded diagnosis. While there were no mental health
8 contacts until 2008, the claimant is given the benefit of
the doubt, and it is concluded that she has experienced a
poorly defined developmental disorder, before the date of
last insured.

9 (Tr. 18.) Although the ALJ cites to CWCMH records (Exhibits 11F and
10 12F), it appears the she based her mental impairment step two
11 finding on the letters written by Plaintiff's mother. (*Id.*) It is
12 noted on independent review that Dr. Humann specifically diagnosed
13 a "pervasive developmental disorder." (Tr. 263.) Nonetheless, the
14 ALJ did not reference this evidence as support of her step two
15 findings. Rather, the ALJ rejected Dr. Humann's formal diagnoses
16 of OCD and pervasive developmental disorder, NOS⁴ because (1) they
17 were based on Plaintiff's uncorroborated self-report; (2) Dr. Humann

18 ⁴ The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION
19 (DSM-IV) defines Pervasive Developmental Disorder Not Otherwise
20 Specified as follows:

21 This category should be used when there is a severe and
22 pervasive impairment in the development of reciprocal social
23 interaction or verbal and nonverbal communication skills, or
24 when stereotyped behavior, interests, and activities are
25 present, but the criteria are not met for a specific Pervasive
26 Developmental Disorder, Schizophrenia, Schizotypal Personality
Disorder, or Avoidant Personality Disorder. For example, this
category includes atypical autism - presentations that do not
meet the criteria for Autistic Disorder because of late age of
onset, atypical symptomatology, or subthreshold symptomatology,
or all of these.

27 DSM-IV 299.80.
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1 saw Plaintiff only one time⁵; (3) there was no treatment history or
2 12 month GAF assessment; (4) the assessment was "questionable when
3 contrasted with claimant's history"; and the evaluation took place
4 long after the DIB insured period. (Tr. 20.) Specifically, the ALJ
5 found neither Dr. Humann nor Mr. Burns "had enough contact with
6 claimant to provide a thorough evaluation. They both appear to rely
7 on her subjective allegations, at a time long after those are
8 relevant, in view of the date she was last insured for disability
9 benefits." (Tr. 20.)

10 The ALJ's rejection of Dr. Humann's diagnoses and opinions is
11 internally inconsistent with the ALJ's finding that Plaintiff had a
12 severe impairment of "poorly defined developmental disability,"
13 based on Plaintiff's mother's uncorroborated statements. As found
14 by the ALJ, Plaintiff's mother's letters support Plaintiff's
15 allegations. (Tr. 23.) Plaintiff's mother's statements relied upon
16 by the ALJ are consistent with the information Plaintiff provided to
17 Dr. Humann's and upon which the rejected medical source evaluation
18 is based. Further, the ALJ's determination that Plaintiff is not

19 ⁵ Dr. Humann's opinions are not contradicted by other medical
20 opinions, therefore reasons to reject her opinions must be "clear
21 and convincing." By definition, an examining medical source has
22 limited contact with a claimant, as compared to a treating source
23 whose opinion is generally given more weight because of the ongoing
24 patient-physician relationship and longitudinal perspective. 20
25 C.F.R. § 404.1527. The ALJ's rejection of Dr. Humann's opinions
26 because of this limited contact is not a "clear and convincing"
27 reason.
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1 credible is inconsistent with her finding that the mother's letters
2 are supportive of Plaintiff's allegations. The ALJ gave no
3 explanation why she credited Plaintiff's mother's testimony as
4 support for one severe mental impairment, but rejected her testimony
5 and Dr. Humann's opinions as irrelevant for the OCD and ADHD claims.
6 (Tr. 24.) ("The testimony and letters of the mother are not highly
7 relevant to the issues at hand.")

8 It does not appear the ALJ relied on medical evidence to
9 support either the step two mental impairment finding or functional
10 limitations caused by the identified mental impairment. (See Tr.
11 21, Finding 5.) The court is unable to discern upon what evidence
12 a finding of "poorly defined developmental disorder" is based. The
13 mother is not an accepted medical source qualified to diagnose a
14 medically determinable mental impairment. 20 C.F.R. § 404.1508;
15 1513(a). The ALJ's step two findings do not represent a rational
16 interpretation of the evidence, are not supported by substantial
17 evidence, and as discussed below, are based on an inadequate record.

18 **C. Duty to Develop Record**

19 Generally, an ALJ's duty to supplement the record is triggered
20 by ambiguous evidence or when the record is inadequate to properly
21 evaluate the evidence. *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th
22 Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.
23 2001). This duty is heightened when a claimant is unrepresented at
24 the proceedings. With a *pro se* claimant, the ALJ must "scrupulously
25 and conscientiously probe into, inquire of, and explore for all
26 relevant facts" and be "especially diligent in ensuring that
27 favorable as well as unfavorable facts and circumstances are

1 elicited." *Vidal v. Harris*, 637 F.2d 710, 713 (9th Cir. 1981)
2 (*citing Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978)). Where
3 a claimant is found to have mental deficits and may be unable to
4 protect her interests, the ALJ's duty is heightened. *Tonapetyan*,
5 242 F.3d at 1150. Here, the ALJ had a duty to develop the record
6 for several reasons: (1) Plaintiff was represented by a lay person
7 during the majority of the administrative proceedings; (2) her first
8 appointed counsel withdrew shortly before her hearing; (3) current
9 appointed counsel was not obtained until four weeks before the
10 hearing; (4) Plaintiff alleges mental illness; and (5) the record is
11 insufficient to properly evaluate the mental impairments claimed and
12 their limiting effects.

13 The record shows the Commissioner was aware Plaintiff was
14 unrepresented by counsel until very late in the proceedings. (Tr. 9,
15 42.) ALJ Lazuran acknowledged Plaintiff's attorney had taken the
16 case at the last minute. (Tr. 277.) The fact that Plaintiff's
17 counsel made an eleventh hour attempt to supplement the record does
18 not relieve the Commissioner of his duty to fully and fairly
19 evaluate Plaintiff's claim. *Tonapetyan*, 242 F.3d at 1150. In
20 addition to acknowledging the attorney's recent appointment to the
21 case, the ALJ accepted that Plaintiff suffered some mental
22 deficiencies, as reflected in her step two finding, but considered
23 the uncontradicted evaluation by Dr. Humann inadequate to confirm a
24 diagnosis of alleged OCD or ADHD. (Tr. 24.) When she evaluated the
25 post-hearing evidence and concluded it was not helpful, the ALJ had
26 a duty to "conscientiously probe" or "inquire scrupulously" into the
27 severity and limiting effects, if any, of Plaintiff's mental
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1 problems. Without additional evidence, the record is inadequate to
2 evaluate Plaintiff's claim.

3 **D. Remedy**

4 A medically determinable impairment must be established by an
5 acceptable medical source. 20 C.F.R. §§ 404.1508. The ALJ does not
6 identify substantial evidence to support her step two finding of a
7 "poorly defined developmental disorder," or her unexplained
8 conclusion that Plaintiff is limited to simple work tasks "involving
9 occasional social interaction." (Tr. 17, 21.) The Commissioner has
10 a duty to Plaintiff to "ensure favorable as well as unfavorable
11 facts and circumstances are elicited"; therefore, the matter must be
12 remanded for additional proceedings. See *Vidal*, 637 F.2d at 713.
13 If additional proceedings and objective testing on remand reveal
14 Plaintiff has medically determinable mental impairments and credible
15 limitations, and the presentation indicates the possibility of a
16 remote onset of disability, medical expert testimony is required to
17 infer an onset date. SSR 83-20.⁶ A medical expert also may be
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19 ⁶ The onset date represents the date upon which Plaintiff is
20 disabled and, therefore, eligible for benefits. The establishment
21 of the onset date is especially critical in Title II (DIB) cases,
22 because it may affect whether Plaintiff is eligible for past earned
23 benefits, and if so, the amount she can be paid. Where an
24 impairment is not caused by a distinct trauma, or is progressive,
25 and/or the record is ambiguous as to the onset of disability, the
26 ALJ must call a medical expert to aid in determining the onset date.
27 Thus, if additional testing reveals disabling limitations from a
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1 helpful to the ALJ in resolving conflicts in the medical evidence
2 and identifying impairments based on the entire medical record.

3 Additional evidence and the assistance of a medical expert
4 might not result in a finding of disability. A step two
5 determination that a mental impairment is medically determinable and
6 severe "only raises a prima facie case of a disability." *Hoopai v.*
7 *Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007). Thus, the court makes
8 no rulings as to Plaintiff's severe impairments or resulting
9 limitations. It is possible Plaintiff will not succeed in proving
10 she is disabled as defined by the Social Security Act.

11 On remand the Commissioner shall obtain additional
12 psychological diagnostic testing and evaluation by an acceptable
13 medical source, and if necessary, medical expert testimony to assist
14 in interpreting the medical evidence. The ALJ shall also make new
15 credibility findings; re-evaluate lay witness testimony; make a new
16 RFC determination based on the entire record; and, if necessary,
17 obtain vocational expert testimony at steps four and five.
18 Accordingly,

19 **IT IS ORDERED:**

20 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
21 **GRANTED** and the ALJ's decision is **REVERSED AND REMANDED** to the
22 Commissioner for additional proceedings pursuant to sentence four of
23 42 U.S.C. § 405(g) and consistent with this decision;

24 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) is
25 **DENIED.**

26 _____
27 severe mental impairment, a medical expert may be required to
28 establish when the disability began. SSR 83-20.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

DATED July 8, 2010.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE